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37 pp Nos. 06-1195 and 06-1196

IN THE

Supreme Court of the United States

LAKHDAR BOUMEDIENE, *et al.*
Petitioners,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

KHALED A.F. AL ODAH, *et al.*,
Petitioners,

v.

UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RETIRED GENERALS AND ADMIRALS, WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND THE NATIONAL DEFENSE COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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QUESTIONS PRESENTED

Amici address the following questions only:

1. Whether aliens detained as enemy combatants at Guantanamo Bay, Cuba have rights under the Suspension Clause of Article I, Section 9 of the Constitution.

2. Whether, if aliens detained at Guantanamo Bay have such rights, the Military Commissions Act of 2006 (MCA), Pub. L. No, 109-366, 120 Stat. 2600, violates the Suspension Clause.

3. Whether Petitioners may challenge the adequacy of the judicial review available under the MCA and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, before they have exhausted such review.

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INTERESTS OF *AMICI CURIAE*

Amici curiae are seven individuals who are retired generals or admirals in the U.S. armed forces, and several organizations with an interest in national security issues.[1]

Major General John Altenburg, U.S. Army (Ret.), served two years as an enlisted man and 28 years as an Army lawyer. His Military Justice and Combat Operations and Peacekeeping Law experience included service or legal oversight in Vietnam, Special Operations, Operation Desert Storm-Kuwait/Iraq, Operation Restore Hope-Somalia, Operation Uphold Democracy-Haiti, Operation Joint Endeavor/Guard-Bosnia, and Joint Guardian-Kosovo, followed by four years as the Deputy Judge Advocate General (1997-2001). He served as the Appointing Authority for Military Commissions from March 2004 to November 2006.

Rear Admiral James J. Carey, U.S. Navy (Ret.), served 33 years in the U.S. Navy and Naval Reserve, including service in Vietnam. He is a former Chairman of the U.S. Federal Maritime Commission and current Chairman of the National Defense Committee (NDC), which is also joining in this brief. The NDC is a grass roots pro-military organization supporting a larger and stronger military and the increased participation by veterans in public service.

Rear Admiral Steven B. Kantrowitz, U.S. Navy (Ret.), served on active duty and in the Reserve of the U.S. Navy from September 1974 through January 2005. He retired as a Rear Admiral in the Judge Advocate General's Corps. During active duty, he served as a judge advocate performing duties involving the full reach of military law practice. This includes service for three years as Special Assistant and Aide to the

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. *Amici* are filing with the consent of all parties. Letters of consent have been lodged with the Clerk.

Judge Advocate General of the Navy. At the time of his selection to flag rank, he served as commanding officer of an international and operational law unit. As a Flag officer, he served as the Assistant Deputy Advocate General of the Navy and Deputy Commander, Naval Legal Service Command. He represented the Judge Advocate General, both in the Washington area and at various national and international forums. He was intimately involved in all practice areas, including military justice and international and operational law. Rear Admiral Kantrowitz provided advice on certain issues concerning detained enemy combatants.

Major General Michael J. Marchand, U.S. Army (Ret.), was serving as the Assistant Judge Advocate General of the Army at the time of his retirement on July 1, 2005. As the Number 2 uniformed lawyer in the Army, General Marchand was intimately involved in detainee matters at the Army, Department of Defense, and congressional levels.

Major General Michael J. Nardotti, U.S. Army (Ret.), served 28 years on active duty as a soldier and lawyer. A decorated combat veteran, he served in Vietnam as an Infantry platoon leader and was wounded in action. General Nardotti later earned his law degree and performed duties as a Judge Advocate in world-wide assignments for two decades. He culminated his service as The Judge Advocate General, the senior military lawyer in the Army, from 1993 to 1997.

Rear Admiral William L. Schachte, Jr., U.S. Navy (Ret.), served for over 30 years as a Naval Officer. His first duty assignments were as an unrestricted line officer. A decorated Vietnam volunteer, he served in combat as the Officer-in-Charge of a SWIFT Boat and later as Executive/Operations Officer for Coastal Division 14, Vietnam. He later received a law degree and transferred to the Navy JAG Corps. After receiving an LLM degree (International and Comparative Law) from the George Washington University Law School, he was assigned to the International Law Division in the Pentagon and

began serving in various JAG billets of increasing responsibility. When selected for promotion to Rear Admiral (Lower Half) he was serving as Director of the International Law Division. He was also appointed by the Secretary of Defense as the DoD Representative for Ocean Policy Affairs (DODREPOPA), representing both the Chairman of the Joint Chiefs of Staff and the Secretary of Defense domestically and in bilateral or multilateral international negotiations. After receiving his second star he was assigned as the Deputy Judge Advocate General of the Navy and began serving as the Commander of the Naval Legal Service Command while continuing to serve as DODREPOPA. When he retired, Admiral Schachte was serving as the senior uniformed lawyer in the Department of the Navy.

Brigadier General Thomas L. Hemingway, U.S. Air Force (Ret.), served at the time of his retirement in May 2007 as the Legal Advisor to the Convening Authority in the Department of Defense Office of Military Commissions. He was commissioned as a second lieutenant in 1962 and entered active service in 1965 after obtaining a law degree. He has served as a staff judge advocate at the group, wing, numbered air force, major command, and unified command level. He had also been an associate professor of law at the U.S. Air Force Academy and a senior judge on the Air Force Court of Military Review.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal and state courts to ensure that the United States government is not deprived of the tools necessary to protect this country from those who would seek to destroy it and/or harm its citizens. *See, e.g., Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Demore*

v. Kim, 538 U.S. 510 (2003); *Zadvydas v. Davis*, 533 U.S. 678 (2001). WLF also filed briefs in this matter when it was before the court of appeals.

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

Amici are concerned that, if the federal courts attempt to exert jurisdiction over the types of claims raised in these cases, the Executive and Legislative Branches will be deprived of the flexibility necessary to confront the imminent threats posed to national security by terrorist groups throughout the world. *Amici* do not mean to denigrate the liberty interests being asserted by Petitioners. Nonetheless, *amici* do not believe that a federal habeas corpus proceeding is the proper forum for reviewing those interests, particularly given the determination of the elected branches of government that the CSRT process provides the proper balance between Petitioners' claims and national security concerns.

INTRODUCTION AND STATEMENT OF THE CASE

The United States has been at war with militant Islamists for many years, and most actively since September 11, 2001, when al Qaeda's murderous and unprovoked attack on American civilians resulted in nearly 3,000 deaths. Immediately thereafter, Congress enacted a resolution expressing its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force ("AUMF"), Pub.L. No. 107-40, 115 Stat. 224 (2001). President Bush has determined that al Qaeda and the Taliban are such

organizations; he has authorized the use of force against al Qaeda, the Taliban, and their operatives in Afghanistan and throughout the world. The military campaign against al Qaeda and the Taliban continues unabated, and they continue to pose a substantial threat to national security. Based in part on the authority granted under the AUMF, the U.S. military has taken into custody numerous al Qaeda and Taliban operatives. Several hundred of those operatives, including each of the Petitioners, are being detained at U.S. military facilities in Guantanamo Bay, Cuba.

The United States can justly be proud of the humane and fair manner in which it has treated those prisoners. In particular, the Executive Branch and Congress have worked together to devise a system for ensuring that prisoners not charged with crimes do not remain in detention – a detention which, pursuant to the law of war, will end no later than the conclusion of hostilities – unless review tribunals confirm both their enemy combatant status and that they continue to pose a threat to United States national security interests. Those review proceedings are unparalleled in the history of warfare. They have resulted in a number of determinations that prisoners should be set free because the prisoners do not meet the criteria for enemy combatant status. Many other prisoners have been set free because they were deemed no longer to pose a threat to the United States. Most notably, Congress and the President have provided that detainees may appeal adverse review tribunal decisions to the U.S. Court of Appeals for the District of Columbia Circuit – an appeal right that this Court held in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not constitutionally required even for U.S. citizens.

Petitioners are asking the Court to second-guess the joint determination of the elected branches of government regarding how to handle the claims of detainees being held at Guantanamo Bay. The Court should decline that invitation. It already determined in *Hamdi* that the elected branches of

government are entitled to employ proceedings outside the federal court system to handle the factual-innocence claims of those (including Americans) being held as enemy combatants. The President and Congress are much better situated than is this Court to determine how best to balance fairness to detainees with the need to conduct proceedings in a manner that does not compromise national security interests. Our tradition of judicial review provides the Court with the raw power to overturn not only the considered judgments of the elected branches but also centuries of judicial precedents rejecting recognition of habeas corpus rights under these circumstances. But such an undemocratic exercise of raw power would stain the Court's reputation, a stain that could take many years to erase.

This Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that the federal habeas corpus statute, 28 U.S.C. § 2241, provided the federal courts with jurisdiction over the habeas claims of enemy combatants being held at Guantanamo Bay. Within several months thereafter, virtually every Guantanamo Bay detainee had filed a habeas corpus action in U.S. District Court for the District of Columbia, seeking release from custody.

In July 2004, the United States established an administrative procedure whereby Guantanamo Bay detainees (including all of the Petitioners) could challenge the military's determination that they had engaged in hostilities against the United States or its coalition partners. The procedures permit a detainee to go before a Combatant Status Review Tribunal ("CSRT"), be informed of the factual basis for his detention, submit evidence in an effort to demonstrate that he has not fought against the United States, and obtain the assistance of a translator and a "Personal Representative" in presenting his case. *See* July 7, 2004 Order of Deputy Secretary of Defense,

Pet. App. 81a-82a.[2] Since that date, all Guantanamo Bay detainees have had CSRT proceedings offered to them, and a number have been released after CSRT determinations that they were not, in fact, enemy combatants.[3]

Congress responded to the flood of post-*Rasul* habeas filings by adopting the Detainee Treatment Act of 2005 ("DTA"), Pub.L. No. 109-148, Tit. X, 119 Stat. 2739. Section 1005(e)(1) of the DTA amended the federal habeas statute to provide that "no court, justice, or judge shall have jurisdiction" over habeas petitions filed by Guantanamo Bay detainees. Section 1005(e)(2) provides that "exclusive jurisdiction to determine the validity of any final decision of a [CSRT] that an alien is properly detained as an enemy combatant" resides in the U.S. Court of Appeals for the District of Columbia Circuit. Many Guantanamo detainees whose detention has been upheld by a CSRT (including all of the Petitioners) have sought review pursuant to the DTA in the D.C. Circuit.

In 2006, this Court ruled in *Hamdan* that § 1005(e)(1), which eliminated jurisdiction over habeas claims filed by Guantanamo detainees, did not apply to habeas claims (including Petitioners') pending on the date of the DTA's enactment. *Hamdan*, 126 S. Ct. at 2762-69. Congress responded to *Hamdan* by adopting the Military Commissions Act of 2006 (MCA), Pub. L. No, 109-366, 120 Stat. 2600 (2006). Section 7(a) of the MCA amended the federal habeas corpus statute to make absolutely clear that Congress intended to deprive federal courts of jurisdiction to hear: (1) habeas

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[2] References herein to "Pet. App." are to the Petition Appendix in No. 06-1196.

[3] Those releases were in addition to the many Guantanamo Bay detainees who have been released because the military determined (in connection with separate, on-going review proceedings) that they no longer posed a threat to national security.

claims of any alien determined by the United States to have been properly detained as an enemy combatant or who is awaiting such a determination; and (2) any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or condition of confinement of such an alien – except as provided in the DTA.[4] Section 7(b) of the MCA stated that the jurisdiction-limiting provisions of § 7(a) would take effect immediately upon enactment of the MCA. *See* 28 U.S.C. § 2241(e)(1) & (2).

The DTA and MCA were adopted while Petitioners' habeas petitions were pending before the D.C. Circuit. In February 2007, the D.C. Circuit dismissed the petitions, holding that the MCA deprived the federal courts of jurisdiction to hear them. Pet. App. 1a-50a. The court rejected Petitioners' claim that the MCA did not apply to them, stating, "Everyone who has followed the interaction between Congress and the Supreme Court knows full well that one of the primary purposes of the MCA was to overrule *Hamdan*." *Id.* 6a.

The court went on to hold that, in depriving federal courts of jurisdiction over the habeas petitions filed by Guantanamo detainees, Congress had not violated the Suspension Clause, U.S. Const., art. I, § 9, cl. 2.[5] *Id.* 9a-19a. The court said that the Suspension Clause "protects the writ 'as it existed in 1789.'" *Id.* at 10a (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). Noting that Petitioners are aliens being held outside the sovereign territory of the United States, the Court said, "The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended

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[4] *E.g.*, DTA § 1005(e)(2)'s grant of jurisdiction to the D.C. Circuit to review final decisions of a CSRT.

[5] The Suspension Clause states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

to aliens beyond the Crown's dominions." *Id.* 11a. The court also cited decisions from this Court holding that "the Constitution does not confer rights on aliens without property or presence within the United States." *Id.* 14a (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)). The court rejected Petitioners' efforts to distinguish *Eisentrager* on its facts. *Id.* 16a.[6]

SUMMARY OF ARGUMENT

In adopting the MCA, Congress and the President acted to eliminate federal court jurisdiction over habeas claims filed by Petitioners and other Guantanamo detainees. Their actions are fully consistent with the Suspension Clause, which protects jurisdiction over the writ as it existed in 1789. A fair reading of English and colonial history can only lead one to conclude that Eighteenth Century detainees similarly situated to Petitioners would not have had access to the writ. Although the parties dispute the meaning of a handful of historical precedents, one fact stands out among all others: Petitioners can point to *no case arising in a military context* in which an English court entertained a habeas petition filed by an overseas alien. Given the ten of thousands of aliens taken into custody overseas by the British military as alleged enemy combatants in the centuries preceding 1789, one would think that there would have been at least one recorded challenge to such custody if, indeed, British courts had had jurisdiction to hear such habeas claims.

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[6] In dissent, Judge Rogers would have held that: (1) the MCA's efforts to restrict federal habeas corpus jurisdiction violated the Suspension Clause; and (2) CSRT proceedings are not an adequate substitute for the searching review of government detention to which Petitioners are entitled in habeas proceedings. *Id.* 21a-50a.

Given the high level of deference normally afforded by the federal courts to the national security determinations of the elected branches of government, it would be extraordinary for this Court to invoke the Suspension Clause to override the considered judgment of the other branches that Petitioners' claims are best handled by means of CSRT proceedings. But it would be all the more extraordinary to do so in light of an unbroken line of Supreme Court precedent rejecting assertions by overseas aliens that the Constitution protects their right to file habeas claims. Petitioners citation to *Rasul* in support of their claim is unfounded. The Court stated repeatedly in *Rasul* that the only question it was deciding was the reach of the habeas corpus statute, 28 U.S.C. § 2241. *See, e.g., Rasul,* 542 U.S. at 475. Now that Congress and the President have amended § 2241 to overturn the result in *Rasul* and *Hamdan*, the Court must decide an issue that *Rasul* pointedly declined to address – whether the Constitution protects the right of Guantanamo detainees to seek habeas relief in federal court. Indeed, *Rasul* strongly supports the federal government's position. It distinguished *Eisentrager* by stating that *Eisentrager* had decided the constitutional issue and had not directly focused on the statutory issue raised in *Rasul.* 542 U.S. at 477-79. Accordingly, *Rasul* makes clear that the Court cannot accept Petitioner's interpretation of the Suspension Clause without either overruling or ignoring *Eisentrager.* Moreover, *amici* (who include seven retired generals and admirals) have serious concerns that a decision recognizing Petitioners' habeas claims could compromise American military effectiveness.

If the Court rejects the decisions of Congress, the President, and this Court in *Eisentrager* by ruling that Petitioners have a right to seek habeas relief in the federal courts, it should nonetheless decline to exercise jurisdiction because Petitioners have failed to exhaust remedies available to them. By creating the CSRT procedure, Congress and the

President have provided Petitioners with a means of challenging their detention. Those proceedings have led to the release of numerous Guantanamo detainees. Moreover, those such as Petitioners who were determined by a CSRT to be enemy combatants are entitled to seek review of those determinations in the D.C. Circuit. Petitioners contend that those proceedings are constitutionally inadequate. At a minimum, that contention is premature because Petitioners have not yet obtained a ruling from the D.C. Circuit on their claims. Under those circumstances, basic notions of interbranch comity at the federal level weigh heavily against exercise of the Court's equity jurisdiction. Petitioners cite individual instances in which they contend that detainees were not treated fairly by a CSRT. If so, that might be grounds for overturning an individual CSRT decision, but it would not be grounds for condemning the entire CSRT procedure.

ARGUMENT

I. ALIENS DETAINED OVERSEAS AS ENEMY COMBATANTS ARE NOT DEPRIVED OF ANY RIGHTS UNDER THE SUSPENSION CLAUSE BY BEING DENIED THE RIGHT TO SEEK HABEAS RELIEF

As the appeals court recognized, Pet. App. 6a-9a, the MCA unambiguously expresses Congress's intent to deprive the federal courts of jurisdiction over Petitioners' habeas claims. Accordingly, the only substantial question is whether, in doing so, Congress has deprived Petitioners of rights guaranteed them under the Suspension Clause.

The Suspension Clause is not a one-way ratchet; that is, it does not operate to enshrine every expansion of federal court habeas jurisdiction adopted by Congress over the past 220 years. Rather, the Suspension Clause "protects the writ as it

existed in 1789." *St. Cyr*, 533 U.S. at 301. The constitutionality under the Suspension Clause of the MCA's limitation on habeas jurisdiction "therefore turns on whether the writ was generally available to those in [Petitioners'] position in 1789 (or possibly thereafter) to challenge detention." *Demore v. Kim*, 538 U.S. 510, 538 (2003) (O'Connor, J., concurring in part and concurring in the judgment).

The D.C. Circuit concluded, "The detainees cite no case and no historical treatise showing that the English common law writ of habeas corpus extended to aliens beyond the Crown's dominions. Our review shows the contrary." Pet. App. 11a. Citing many of the same historical materials they cited to the appeals court, Petitioners dispute the appeals court's conclusion. *See, e.g.*, Boumediene Pet. Br. 10-15; Al Odah Pet. Br. 13-16. They assert, for example (and the federal government disputes), that British courts in India had authority to grant writs of habeas corpus to Indian petitioners even before Britain asserted formal sovereignty over India in 1813. The parties dispute at length the meaning of virtually every English case cited by either side; to avoid repetition, we will not elaborate on that historical debate.

We limit ourselves to one observation: Petitioners can point to *no case arising in a military context* in which a court entertained a habeas petition filed by an overseas alien. For example, the Indian cases on which Petitioners rely involved Indian petitioners being detained by either the East India Company or Indian rulers, not by British government officials. In particular, Petitioners point to no such case in which British judges in India asserted habeas jurisdiction over the claim of an alien being held by the British military. Given the ten of thousands of aliens taken into custody overseas by the British military as alleged enemy combatants in the centuries preceding 1789, one would think that there would have been at least one recorded challenge to such custody if, indeed, British courts had had jurisdiction to hear such habeas claims.

A. Substantial Deference Is Due Congress's and the President's Determination That Petitioners' Claims Are Best Handled by Means of CSRT Proceedings

Following the attack on America by islamic extremists on September 11, 2001, Congress adopted the AUMF – which authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." *Hamdi* determined that the authorization granted by the AUMF includes authorization to detain, for the duration of hostilities, those associated with al Qaeda and the Taliban. *Hamdi*, 542 U.S. at 517-19. As the *Hamdi* plurality explained:

> [D]etention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incidence to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. [¶] The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war."

Id. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

Petitions are being detained pursuant to that congressionally authorized power. As noted above, Congress and the President have further concluded that those detainees who wish to contest their status as enemy combatants should do so pursuant to the CSRT procedures. Even without express authorization from Congress, the President's actions in the fields of foreign policy and national security are entitled to substantial deference from the courts. *See, e.g., Quirin*, 317 U.S. at 25 ("[T]he detention and trial of petitioners – ordered

by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and grave public danger – are not to be set aside by the Courts without clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

Given Congress's explicit authorization of detention (through its adoption of the AUMF) and its endorsement of the CSRT procedures (through its adoption of the DTA and the MCA), the deference due the elected branches of government in this case is particularly strong. As the Court has recognized, when "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 632 (1952) (Jackson, J., concurring)). *See also Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("heightened deference to the judgments of the political branches with respect to foreign policy" is particularly warranted with respect to terrorism-related issues).

Given the high level of deference normally accorded by the federal courts to the national security determinations of the elected branches of government, it would be extraordinary for this Court invoke the Suspension Clause to override the considered judgment of the other branches that Petitioners' claims are best handled by means of CSRT proceedings. Indeed, senior Executive Branch officials have told the D.C. Circuit that even the detention review procedures established by the DTA create serious national security concerns. CIA Director Michael V. Hayden told the appeals court that

providing government materials requested by the court in connection with its ongoing review of CSRT enemy combatant determinations posed "an extremely grave risk to the national security" by "disclos[ing] the classified details of the CIA's counterterrorism operations" and "reveal[ing] the CIA's sensitive intelligence sources and methods." *See* Sept. 6, 2007 Declaration of Michael V. Hayden in support of Respondent's Petition for Rehearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). Deputy Secretary of Defense Gordon R. England told the court that gathering requested materials was imposing "an immense burden on the Department of Defense," leading to "compromise of resources necessary for the war effort, and diversion of significant manpower from the war time mission." *See* Sept. 7, 2007 Declaration of Gordon A. England in support of Respondent's Petition for Rehearing, *Bismullah v. Gates*, No. 06-1197 (D.C. Cir.). Yet, Petitioners are asking the Court to require full-blown habeas corpus review of each and every detention decision, a review that all agree would be far more intrusive than the CSRT review that is already raising serious national security concerns.

This Court is ill-equipped to second-guess Congress's and the President's determination that national security considerations require the more limited judicial review provided by DTA § 1005(e)(2). The expansive interpretation of the Suspension Clause being pressed by Petitioners is inconsistent with the courts' traditional deference to the elected branches of government on foreign policy issues.

B. Petitioners' Suspension Clause Claims Are Inconsistent with *Eisentrager* and Other Decisions of This Court

Petitioners' Suspension Clause claims are inconsistent with *Eisentrager* and other decisions of this Court. Those

claims cannot be accepted without repudiating a long line of Court decisions.

More than 50 years ago, the Supreme Court held in *Eisentrager* that the U.S. Constitution provides no protection for the habeas corpus claims of aliens being held overseas by the United States, when the aliens at no time have been within the territorial jurisdiction of the United States. In the ensuing years, the Supreme Court has on numerous occasions cited *Eisentrager* with approval, and has given no indication that its continued vitality is in doubt.

At no relevant times have Petitioners had any meaningful connection with the United States. They were taken into custody in overseas locations and later transferred to Cuba. None of the Petitioners makes any claim to citizenship, resident alien status, ownership of property in the United States, or any other connection with this country. Accordingly, *Eisentrager* dictates a finding that nothing in the U.S. Constitution provides the federal courts with jurisdiction over Petitioners' challenges to their continued detention. Petitioners' numerous efforts to distinguish *Eisentrager* are unavailing.

Eisentrager involved habeas corpus petitions filed by 21 German citizens being held in an American-controlled prison in post-war Germany. They had been employed in China by *civilian* agencies of the German government at the time of Germany's surrender in April 1945. They were being held because a military tribunal had determined that, in violation of the terms of surrender (which required Germans to cease hostile activities at once), they collaborated with the Japanese government, which controlled the portion of China in which they were stranded at the time of the German surrender. *Eisentrager*, 339 U.S. at 765-66. They challenged the propriety of the military tribunal that had imposed sentence on them and denied their guilt; they contended that their imprisonment violated numerous provisions of the U.S.

Constitution. *Id.* at 767. Their case reached the Supreme Court nearly five years after the surrender of all Axis powers and the cessation of combat.

The D.C. Circuit (which heard the case in 1949) had recognized that the federal habeas *statute* did not provide jurisdiction over the Germans' claims because their custodian was not located within the territorial jurisdiction of any federal court. It nonetheless held that federal court must be deemed to possess such jurisdiction "as part of the judicial power of the United States" because anyone being detained by the U.S. government in violation of constitutional right ought to be permitted to seek relief in some federal court. *Eisentrager v. Forrestal*, 174 F.2d 961, 963-65 (D.C. Cir. 1949).

The Supreme Court reversed that constitutional ruling, stating, "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction." *Eisentrager*, 339 U.S. at 768.

Eisentrager repeatedly expressed the limits on federal court jurisdiction not in terms of "control" over the petitioner and the place of his confinement (the nomenclature used by the D.C. Circuit), but in terms of whether aliens seeking access to the courts are within the territorial jurisdiction of the United States. For example, in describing the historical limits of federal court jurisdiction, the Court explained:

> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v. Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of

> nationality; * * *." (Italics supplied.) 118 U.S. 356 [(1886)].

Eisentrager, 339 U.S. at 771.[7]

In rejecting claims that the Germans were entitled under the U.S. Constitution to file habeas petitions in federal court, this Court stated, "We have pointed out that the privilege of litigation has been extended to aliens, *whether friendly or enemy*, only because permitting their presence in this country implied protection." *Id.* at 777-78 (emphasis added). The Court said that the Germans could not invoke such "implied protection" jurisdiction because they were at no relevant time "within any jurisdiction over which the United States is sovereign" but rather "were beyond the territorial jurisdiction of any court of the United States." *Id.* at 778.

The Court on several occasions in recent years has cited *Eisentrager* with approval. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990), the Court held that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico. In support of that holding, the Court cited *Eisentrager* for the proposition that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign

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[7] In other words, aliens seeking to enter the United States but excluded on the basis of the immigration laws are not entitled to constitutional protections, regardless whether they are deemed friendly aliens or enemies. *See, e.g., United States ex rel. Knauf v. Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning the deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien.").

territory of the United States." *Id.* at 269.[8] More recently, the Court cited both *Eisentrager* and *Verdugo-Urquidez* for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside our geographic borders." *Zadvydas*, 533 U.S. at 693.

Petitioners' numerous efforts to distinguish *Eisentrager* are unavailing. Petitioners allege that controlling significance should be attached to several factual distinctions between them and the German detainees in *Eisentrager*:

> [Guantanamo detainees] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two [now almost six] years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Boumediene Pet. Br. 16 (quoting *Rasul*, 542 U.S. at 476).

The distinctions Petitioners cite either no longer exist or are of no legal relevance to the legal issues raised by this case:

(1) It is true that the U.S. is not at war with the nations of which Petitioners are citizens. But the military situation here renders Petitioners' claims far less appealing than

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[8] Petitioners on several occasions state that Justice Kennedy's concurring opinion in *Verdugo-Urquidez* is the "controlling opinion" in that case regarding the extraterritorial application of constitutional rights. *See, e.g.*, Boumediene Pet. Br. 47. As Petitioners are well aware, that statement is false. The "controlling opinion" in that case is the majority opinion. Justice Kennedy's views are entitled to the same respectful consideration as any other separate opinion of a Supreme Court justice. But the majority opinion in *Verdugo-Urquidez* is the one that serves as binding precedent in this Court.

did the military situation facing the Court in *Eisentrager*. In that case, although a formal peace treaty had not yet been signed, the Axis had surrendered and fighting had been over for five years. Here, the United States continues to face active military resistance from the organizations with which Petitioners have been found to be affiliated. *See, e.g.*, Griff Witte, "Pakistan Seen Losing Fight Against Taliban and Al-Qaeda," *Washington Post*, Oct. 3, 2007, at A01.

(2) Petitioners deny that they engaged in acts of aggression against the United States, but so did the German petitioners. *See Eisentrager*, 339 U.S. at 785 (Germans claimed to have acted solely in civilian roles and that the charge against them was not a "charge of an offense against the law of war").

(3) Petitioners' claims that they were not enemy combatants had not been adjudicated by any tribunal at the time that *Rasul* was decided in 2004. But they have now had hearings before CSRTs, which determined that they are, in fact, enemy combatants. Petitioners complain about both the composition and the fairness of the CSRTs, but the German petitioners had similar complaints about the tribunal that determined their guilt. Moreover, unlike the Germans (who had no legal recourse other than their habeas claims), Petitioners have been granted a right to appeal the adverse CSRT decisions to the D.C. Circuit.

(4) Petitioners are being held at a facility (Guantanamo Bay) over which the United States exercises exclusive jurisdiction and control. But the German petitioners likewise were being held in a facility (Landsberg Prison) over which the United States exercised exclusive jurisdiction and control. In neither case did the United States claim the land as sovereign U.S. territory. In both instances the sovereign was/is incapable of interfering with U.S. detention decisions. It is certainly unrealistic to think

that a defeated, post-war West Germany was in any position in 1950 to take action against the United States to interfere with its decision to continue to detain Eisentrager and the other German petitioners or to contest U.S. control over Landsberg Prison.

Moreover, *Eisentrager* made clear that the factual distinctions to which Petitioners cite were not relevant to its decision. For example, although the German petitioners were technically still "alien enemies" (because Germany and the United States still had not signed a peace treaty in 1950), the Court explained that the United States was quite willing to extend "the privilege of litigation" to *any* alien, "whether friendly or enemy," so long as it could be "implied" that the United States had offered "protection" to that alien. *Eisentrager*, 339 U.S. at 777-78. The German petitioners were denied "the privilege of litigation" not because they were "alien enemies" but because they were aliens who at no relevant times were within the "sovereign" territory of the United States or within "the territorial jurisdiction of any court of the United States." *Id.* Similarly, Petitioners are not entitled to "the privilege of litigation" – even though (despite their demonstrated hostility to the United States) they are not technically "enemy aliens" – because they have no relevant ties to sovereign U.S. territory or to any area within the jurisdiction of a federal court.

As noted above, the Court relied on *Eisentrager* to hold in *Verdugo-Urquidez* that aliens with "no voluntary attachment to the United States" were not permitted to invoke the Fourth Amendment to challenge a search by American authorities in Mexico, even though the same search would have been constitutionally protected if the defendant had been a U.S. citizen or resident alien. *Verdugo-Urquidez*, 494 U.S. at 274-75. Indeed, *Verdugo-Urquidez* expanded Eisentrager's holding by denying constitutional rights to a nonresident alien even after he was brought involuntarily to the U.S. to stand

trial. Accordingly, even if it could plausibly be claimed that Guantanamo Bay is somehow the equivalent of sovereign U.S. territory, *Verdugo-Urquidez* strongly supports an argument that Petitioners' involuntary presence and detention at Guantanamo Bay (a detention undertaken solely to prevent them from waging war against the United States) does not create a sufficient relationship between themselves and the United States to entitle them to "the privilege of litigation."

Petitioners contend that *Rasul* calls into question the continued viability of *Eisentrager*. *See, e.g.*, Al Odah Pet. Br. 20 (citing *Rasul*, 542 U.S. at 483 n.15). That contention is without merit. First, the language in *Rasul* to which Petitioners point was unquestionably *dicta*; the Court stated repeatedly that the *only* issue it was deciding was the scope of the federal habeas statute. *See, e.g., id.* at 475, 485. Second, the factual allegations cited in Footnote 15 (*e.g.*, extended detention without access to counsel and without a formal basis for detention) are now demonstrably incorrect: Petitioners have all been granted access to counsel; and not only have they been classified as enemy combatants, those classifications have been confirmed by military tribunals.

More importantly, by distinguishing *Eisentrager* as a case primarily focused on constitutional guarantees of habeas corpus, *Rasul* confirms that *Eisentrager* is controlling here. The federal government in *Rasul* had argued that *Eisentrager* stood for the proposition that the federal habeas statute, 28 U.S.C. § 2241, did not extend jurisdiction to overseas aliens lacking any ties to the United States. *Rasul* rejected that interpretation of *Eisentrager*. The Court noted that in 1948 (two years before *Eisentrager* was decided), it had interpreted § 2241 as prohibiting a district court from exercising habeas jurisdiction unless the petitioner was physically present within the district court's territorial jurisdiction. *See Ahrens v. Clark*, 335 U.S. 188 (1948). As recounted in *Rasul*, when Eisentrager's petition reached the D.C. Circuit in 1949, that

court realized (based on *Ahrens*) that the federal courts lacked any statutory basis for exercising habeas jurisdiction over aliens detained in Germany. *Rasul*, 542 U.S. at 477. Thus, *Rasul* explained, the D.C. Circuit was able to exercise jurisdiction only by asserting that Eisentrager had a constitutional right under the Suspension Clause to seek habeas relief without regard to any statutory impediment, "reasoning that 'if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute.'" *Id.* at 477-78 (quoting *Eisentrager v. Forrestal*, 174 F.2d at 965). *Rasul* explained that this Court's central holding in *Eisentrager* was its rejection of the D.C. Circuit's constitutional analysis and that it simply had assumed without deciding that § 2241 did not extend habeas jurisdiction to overseas aliens lacking ties to the United States. *Id.* at 478 & n.8.[9]

Accordingly, *Rasul* strongly supports our understanding of *Eisentrager*: that it explicitly rejected an assertion that the U.S. Constitution (and specifically, the Suspension Clause) protects the right of aliens being held overseas by the U.S. government and lacking ties to the United States to seek habeas relief in the federal courts. Because, as explained above, Petitioners' situation cannot meaningfully be distinguished from that of Eisentrager and the other German prisoners, *Rasul* reinforces *Eisentrager*'s teaching that Petitioners lack any constitutional basis for challenging Congress's decision to abolish federal court habeas jurisdiction over the claims of Guantanamo detainees.

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[9] *Rasul* ultimately decided the statutory issue in favor of the Guantanamo detainees by finding that *Ahrens* had been overruled in 1973 by *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 485 (1973), which held that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of jurisdiction under § 2241. *Id.*

The preceding discussion, by demonstrating the absence of any constitutional violation, renders moot consideration of whether a finding that Petitioners actually possess rights protected under the Suspension Clause is a prerequisite to deciding whether the federal government has violated the Suspension Clause. *Amici* nonetheless agree with the D.C. Circuit that the absence of such rights precludes further consideration of the issue. *See* Pet. App. 17a-19a. The dissenting D.C. Circuit judge had argued that the Suspension Clause is a limitation on congressional power rather than a constitutional right and thus that it is enforceable by the Court without regard to whether the detainee is someone entitled to lay claim to constitutional protections. *Id.* 22a-23a. But as the majority explained, "This [distinction between a limitation on congressional power and a constitutional right] is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on government power." *Id.* 17a. Petitioners are unable to point to a single case in which the courts have struck down a congressional action as unconstitutional in the absence of evidence that the plaintiff's rights under some specific constitutional provision had been violated and that the violation had injured her in some way. The Court has repeatedly stressed that federal courts lack jurisdiction to hear a case in which the plaintiff has failed to demonstrate standing in this manner. *See, e.g., Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007).

In sum, Petitioners' Suspension Clause claims are incompatible with *Eisentrager* and other decisions of this Court. Accordingly, an exercise of jurisdiction over Petitioners' habeas claims would require the Court to reject the national security-related determinations not only of Congress and the President but of prior Supreme Court justices as well.

C. *Amici* Have Serious Concerns That a Decision Recognizing Petitioners' Habeas Claims Could Undermine American Military Effectiveness

Before the Court recognizes the habeas corpus rights sought by Petitioners, *amici* submit that it should think very carefully about the practical effects of such a decision. Such rights for overseas military detainees have never previously been recognized in the annals of warfare and are far more extensive than anything contemplated under the Geneva Conventions.

The retired generals and admirals who have joined this brief collectively have several hundred years of experience in the armed services, both in combat operations and in conducting military legal proceedings. They understand from experience that capturing and detaining enemy combatants in times of war is essential to effective military operations. While *amici* recognize the need for the military to at least consider the claims of innocence of those captured abroad, they have serious concerns that granting those detainees full-fledged habeas rights could compromise American military effectiveness. Based on their experience, they are concerned that American soldiers and sailors cannot be as effective in carrying out their combat missions if they will now also be asked to document the circumstances of every capture to the extent necessary to meet the rigors of habeas review. As one of the *amici* posed the issue in a recent law review article:

> Is the military to become obligated to document all facts surrounding a capture of an enemy, to document the basis for such capture, to produce soldiers to appear in an adversarial setting to be cross-examined by a detainee's counsel, and to provide the manpower and support necessary to conduct formal, legal hearings in all cases of warfare detention . . .? If so, America's war-fighting ability

> will be markedly and adversely affected if the duties of our soldiers as warriors are forced to compete with the obligation to act as investigators.

Gen. Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What if There Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT'L L. & POL'Y 63, 85 (2006).

If habeas rights are extended overseas to Guantanamo Bay, the logic of Petitioners' argument will soon demand that those rights also be extended to detainees held in military facilities controlled by the United States in Afghanistan and elsewhere around the world. *Amici* respectfully submit that such unprecedented steps could be perilous for American national security

II. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION BECAUSE PETITIONERS HAVE FAILED TO EXHAUST THEIR REMEDIES

If the Court rejects the decisions of Congress, the President, and this Court in *Eisentrager* by ruling that Petitioners have a Suspension Clause right to seek habeas relief in the federal courts, it should nonetheless decline to exercise jurisdiction because Petitioners have failed to exhaust remedies available to them. A ruling on Petitioners' Suspension Clause claim will require evaluation of the adequacy of the CSRT procedure as a substitute for habeas corpus. *Amici* submit that that evaluation cannot meaningfully be undertaken until after the D.C. Circuit's review process has been completed. Under those circumstances, basic notions of interbranch comity at the federal level weigh heavily against exercise of the Court's equity jurisdiction.

The injunctive relief sought by Petitioners is equitable in nature. Thus, even assuming that the Court possesses subject matter jurisdiction to hear Petitioners' claims:

> There remains the question of equitable jurisdiction, a question concerned, not with whether the claim falls within the limited jurisdiction conferred on the federal courts, but with whether consistently with the principles governing equitable relief the court may exercise its remedial powers.

Schlesinger v. Councilman, 420 U.S. 738, 753 (1975). *Amici* respectfully submit that, under the equitable principles set forth in *Schlesinger* and elsewhere, the federal courts should abstain from hearing Petitioners' habeas claims until after the CSRT process – including any judicial review under the DTA – has been allowed to run its course.

Schlesinger strongly counseled against entertaining habeas challenges to ongoing court-martial proceedings involving members of the American military. The Court stated that requiring military defendants to exhaust all military remedies before seeking federal court relief served the same purposes of rules requiring exhaustion of remedies before administrative agencies. *Id.* at 756-57. Such rules are:

> [B]ased on the need to allow agencies to develop the facts, to apply the law in which they are particularly expert, and to correct their own errors. The rule ensures that whatever judicial review is available will be informed and narrowed by the agencies' own decisions. It also avoids duplicative proceedings, and often the agencies' ultimate decision will obviate the need for judicial intervention.

Id. The Court also held that exhaustion requirements are particularly important in the context of military proceedings and "counsel strongly" against premature federal court intervention in such proceedings. *Id.* at 757. The Court explained that comity is required because "[t]he military is 'a specialized society separate from civilian society' with 'laws

and traditions of its own [developed] during its long history.'" *Id.* (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).[10]

Each of the factors cited above counsel strongly against interference with the CSRT process before completion of that process. Petitioners have cited what they view as shortcomings in specific CSRTs. But by delaying habeas review until after the CSRT process has been completed, the Court will provide an opportunity for any such errors to be corrected in the manner contemplated by Congress and the Executive Branch, without creating the inevitable friction that arises when Courts strike down a process established by the elected branches. Imposing an exhaustion requirement is particularly appropriate in the military context, given the federal courts' lack of familiarity with the laws and traditions of military society. Whether a particular set of military procedures is fair to a detainee may well not be apparent until after the entire review process has been completed.

The federal courts routinely defer consideration of the habeas claims of state prisoners until after those prisoners have exhausted remedies made available in the state courts. *See* 28 U.S.C. § 2254(b)(1); *Rose v. Lundy*, 455 U.S. 509, 515-516 (1982). Similar considerations counsel imposition of an exhaustion requirement in this case as well.

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[10] As the Court explained elsewhere, requiring exhaustion also serves to eliminate potentially needless friction between the military and the judicial branch:

> If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved.

Gusik v. Schilder, 340 U.S. 128, 132 (1950).

Petitioners should not be heard to complain that inordinate delays in the CSRT process require that their habeas claims be heard immediately. First, much of the delay is attributable to Petitioners themselves, who until recently were shunning the CSRT process – preferring to place all their eggs in the habeas basket.

Second, there is nothing facially inadequate about the CSRT process. For example, it provides for independent D.C. Circuit review of a CSRT's factual determination that a detainee is an enemy combatant. Such federal court review is far more extensive than has been allowed from the decisions of military tribunals in the past. In *In re Yamashita*, 327 U.S. 1 (1946), the Court refused to re-examine *any* of the findings of a military commission, explaining:

> If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision based on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

Yamashita, 327 U.S. at 8.

Petitioners complain about specitic procedures employed by CSRTs, such as the use of hearsay evidence. But the Court only three years ago endorsed use of truncated evidentiary rules by military tribunals to determine whether a detainee is properly classified as an enemy combatant -- even when the detainee is an American citizen. *Hamdi*, 542 U.S. at 533-34 (plurality)(endorsing use of hearsay evidence and adoption of a presumption in favor of the government's evidence); *id.* at 594 (Thomas, J., dissenting). Whatever constitutional rights nonresident aliens being detained at Guantanamo Bay may ultimately be determined to possess, one can safely surmise that those rights are not as extensive as those of similarly situated U.S. citizens. Even when it has extended

constitutional protection to aliens, the Court has routinely applied a more relaxed standard of review when the plaintiffs are aliens than when the plaintiffs are citizens. *See, e.g., Demore*, 538 U.S. at 510; *Verdugo-Urquidez*, 494 U.S. at 273. Accordingly, at the very least the CSRT procedures are not so facially deficient as to warrant overlooking exhaustion requirements.

In sum, Petitioners have supplied no justification for permitting an end-run around the CSRT process before that process has been provided a full opportunity to work. As the Court has warned in the past, there is a significant danger that allowing enemy combatants access to our courts to contest their detention will "hamper the war effort" by requiring our military leaders to "divert [their] efforts and attention from the military offensive abroad to the legal defensive at home." *Eisentrager*, 339 U.S. at 779. Congress has authorized detainees one means of access to the federal courts; there can no justification for permitting detainees to open up a second front.

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment of the appeals court.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

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